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In the
Supreme Court of the United States

October Term, 1989

NEW LIFE BAPTIST CHURCH ACADEMY, et al.,
Petitioners,

v.

TOWN OF EAST LONGMEADOW, et. al.,
and
COMMONWEALTH OF MASSACHUSETTS,
Respondents

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

BRIEF IN OPPOSITION OF RESPONDENT, COMMONWEALTH OF MASSACHUSETTS

JAMES M. SHANNON
ATTORNEY GENERAL

ROBERT H. BLUMENTHAL*
Special Assistant
Attorney General
Massachusetts Board
of Education
1385 Hancock Street
Quincy, MA 02169
(617) 770-7315

*Counsel of Record

(Additional counsel on inside cover)

BEST AVAILABLE COPY

MAUREEN BRODOFF
MARJORIE HEINS
Assistant Attorneys
General
One Ashburton Place
Boston, MA. 02108
(617) 727-2200

QUESTIONS PRESENTED

1. Whether the Free Exercise Clause entirely bars a local school committee from approving the secular education of a private school because of the school's religious belief that subjecting itself to any approval by the state is a sin.

2. Whether an approval process which neither evaluates the religious teaching of a private school nor involves the state on an on-going basis in the affairs of the school constitutes excessive entanglement in violation of the Establishment Clause.

3. Whether an appellate court properly applies the constitutional fact doctrine when it accepts all purely factual findings of the trial court but reviews de novo the trial court's conclusion on the constitutional question whether this Court's "least restrictive means" test for analyzing Free Exercise claims has been satisfied.

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The respondent-intervenor, Commonwealth of Massachusetts, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Court of Appeals' opinion in this case reported at 885 F.2d 940 (1989).

STATUTORY PROVISIONS INVOLVED

Mass. Gen. L. ch. 76, § 1, only a small portion of which is set forth in the Petition for Writ of Certiorari ("Pet.") at 3, is a lengthy statute dealing, inter alia, with compulsory attendance requirements for children residing in the Commonwealth of Massachusetts.

The statute provides in relevant part as follows:

> Every child between the minimum and maximum ages for school attendance established by the board of

> education[1/]...shall...attend a public day school in [the] town [where he or she resides] or some other day school approved by the school committee, during the number of days required by the board of education in each school year...but such attendance shall not be required of a child...who is being otherwise instructed in a manner approved in advance by the superintendent or the school committee. . . .

Regarding the approval of "other day school[s]," the statute additionally provides as follows:

> For the purpose of this section, school committees shall approve a private school when satisfied that the instructions in all the studies required by law[2/]

1/ The minimum age for school attendance is six, Mass Regs. Code tit. 603, § 8.02(1), and the maximum age is sixteen. 1965 Mass. Acts ch. 741.

2/ The studies required by law in Massachusetts are orthography, reading, writing, the English language and grammar, geography, arithmetic, drawing, music, the duties of citizenship, health education, and good behavior, Mass. Gen. L. ch. 71, § 1; the history and constitution of the United States and Massachusetts, Mass. Gen. L. ch. 71, § 2; and physical education, Mass. Gen. L. ch. 71, § 3.

> equals in thoroughness and efficiency, and in the progress made therein, that in the public schools in the same town; but shall not withhold such approval on account of religious teaching....

STATEMENT OF THE CASE

Petitioners' (hereinafter collectively called the "Academy") abbreviated chronology of communications between the Academy and the East Longmeadow School Committee ("School Committee"), and their repeated characterization of the School Committee's approval standards as "unarticulated," Pet. at 7 and 24, "subjective," Pet. at 9, "undefined," Pet. at 14, and "totally discretionary," Pet. at 23 (emphasis in original), are misleading in the extreme for three reasons.

First, the implication these characterizations seek to create is that the litigation is actually a dispute about the reasonableness of the School

Committee's proposed regulation of the Academy's educational activities. Throughout this litigation, however, the issue has never been whether the School Committee's private school approval criteria could be articulated with greater clarity, or in a manner that somehow made them more objective. On the contrary, the issue has always been, and continues to be, whether the Academy would submit to any standards for private school approval whatsoever.

As described in the District Court's findings of fact, the Academy has never wavered in its total opposition to submitting itself in any way to the approval of the School Committee. 666 F.Supp. at 297-299, Pet. App. at 62a-70a.

Indeed, the District Court found, pursuant to a stipulation of the parties, that "it is [the Academy's] sincere religious belief that to submit [its] educational ministry for the prior

or continued approval of secular authorities would violate the sovereignty of Christ over his church and would, therefore be a sin." 666 F.Supp. at 297, Pet. App. at 63a. The Court further found that the Academy "would for religious reasons refuse to submit [itself] for approval by the [School Committee] even if approval was likely to be easily obtained." 666 F.Supp. at 300, Pet. App. at 74a.

Second, to the extent that the School Committee expressed a willingness to be flexible in its approach to approval of the Academy, this merely reflected an effort to accommodate the concerns of the Academy and not, as the Academy would have it, the absence of objective standards. For example, the School Committee had initially requested that all private school teachers hold

college degrees,[3/] a standard that a majority of the Academy's teachers have never met. 666 F.Supp. at 301 n. 5, Pet. App. at 76a n.5.[4/] In an effort

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3/ Contrary to the Academy's contention, Pet. at 8 n.4 and 31, the Massachusetts Supreme Judicial Court has not held that Massachusetts law prohibits school committees from requiring that private school teachers possess college degrees. Care and Protection of Charles, 399 Mass. 324, 504 N.E.2d 592 (1987), held that parents seeking to instruct their children in a home setting could not be required to hold college degrees as a condition of approval. Id. at 339. This case hardly establishes that a degree requirement for private school teachers is invalid.

4/ The District Court found that the School Committee had "a reasonable basis to be concerned about the qualifications of at least some New Life teachers to instruct children." 666 F.Supp. at 306, Pet. App. at 95a. The Academy, in any event, has no religious objection to employing college graduates, so long as they meet the Academy's religious qualifications. Such teachers, moreover, appear to be available; the Academy turned down five college-trained applicants for teaching positions because it did not have openings for them. 666 F.Supp. at 301, Pet. App. at 77a and n.7.

to accommodate the Academy on this issue, School Committee officials agreed to accept lesser credentials for a limited number, but not a majority, of the Academy's teachers. 666 F.Supp. at 300, Pet. App. at 72a.

Finally, the Academy's discussion of its "standardized testing" proposal is misleading. Standardized testing, as proposed by the Academy and endorsed by the District Court, is an alternative to private school approval rather than an alternative means of obtaining such approval. The proposal depends entirely on voluntary cooperation of parents in the periodic administration of standardized tests in all required subjects to Academy students; the submission of the results by the parents, rather than the Academy, to the School Committee (or to committees in other communities where Academy students reside); subsequent meetings between

parents and local school officials; and such follow-up by local school officials, including the possible seeking of "care and protection" orders[5/] should the parents fail to respond to their children's educational needs. 666 F.Supp. at 303, Pet. App. at 81a-83a. The proposal relies entirely on the voluntary or coerced cooperation of individual parents and students and would not require the Academy itself to take any action to improve its educational deficiencies no matter how grave. It would, therefore, give the School Committee no recourse regarding the Academy's educational program

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5/ See Mass. Gen. L. ch. 119, § 24. Care and protection proceedings are a drastic measure aimed at depriving parents of custody of their children. It is a remedy which, as the Court of Appeals has pointed out (885 F.2d at 950, Pet. App. at 33a-34a), is far more intrusive than the approval process under chapter 76, § 1.

regardless of how many students were failing to make satisfactory progress. As the Court of Appeals concluded, this alternative "would 'materially detract'...from the state's efforts to 'accomplish its [compelling] purpose'...thereby 'unduly interfer[ing] with fulfillment of the governmental interest,'...without a compensating reduction in the 'restrictive' nature of the burden imposed on religious freedom." 885 F.2d 940, Pet. App. at 26a (citations omitted).

REASONS FOR DENYING THE WRIT

The Academy states that "New Life Baptist Academy is not objecting to all state regulation of private religious education...[, b]ut it has taken religious and constitutional offense at the method employed by the School Committee of the Town of East Longmeadow." Pet. at 22-23. In fact,

the issue in this case is and has always been the Academy's objection to any state approval process and its insistence on an "alternative" that would deprive the School Committee and the Commonwealth of any authority to approve or regulate private schools.

The Academy attempts to frame the Free Exercise and Establishment Clause issues in this case as novel and substantial enough to merit this Court's review. In fact, the Court of Appeals' decision is wholly consistent with a long line of Supreme Court precedent. It applied the appropriate standards and came to the proper conclusions. Moreover, in its analysis, the Court of Appeals properly applied the constitutional fact doctrine requiring de novo review of First Amendment questions of constitutional fact. Accordingly, the writ should be denied.

I. THE COURT OF APPEALS' RESOLUTION OF THE ACADEMY'S FREE EXERCISE CLAIM IS WHOLLY CONSISTENT WITH THE DECISIONS OF THIS COURT.

The Court of Appeals accurately posed the primary issue in this litigation when it asked, "does the First Amendment's Free Exercise Clause forbid the state (i.e., the School Committee) to insist upon approving the secular education[6/] offered by a religious school that believes it sinful to submit even its secular program to the approval of secular authorities?" 885 F.2d at 944, Pet. App. at 12a.

6/ The Academy would have this Court believe that the Court of Appeals distorted the record by treating the academic component of its curriculum as "secular." Pet. at 4-5, 32-33. Yet there is no indication in the voluminous record that the School Committee's concerns involved matters that could in any way be construed as other than secular. Any consideration by the School Committee of religious matters, moreover, would be strictly forbidden by Mass. Gen. L. ch. 76, § 1, which expressly forbids the School Committee from "withhold[ing its] approval on account of religious teaching."

On this question, the Court of Appeals properly concluded that the answer was clearly no. 885 F.2d at 944, Pet. at 13a.

A. This Court's precedents establish that states may set standards for the approval of private schools.

Nearly 70 years of this Court's opinions underscore the state's compelling interest in regulating education. Education was identified as a matter of "supreme importance" in Meyer v. Nebraska, 262 U.S. 390, 400 (1923). Shortly thereafter, the Court accepted as a given "the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school . . . " Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925). Later cases have conditioned

parents' right to send their children to a religious school on "the school meet[ing] the secular educational requirements which the state has power to impose," Everson v. Board of Education, 330 U.S. 1, 18 (1947); have held education to be "the most important function of state and local government," Brown v. Board of Education, 347 U.S. 483 (1954); have acknowledged that the state's authority to set educational standards for private schools, including teacher qualifications, is "a sensible corollary of Pierce," Board of Education v. Allen, 392 U.S. 236, 247 (1967); have declared "no doubt as to the power of the State . . . to impose reasonable regulations for the control and duration of basic education," Wisconsin v. Yoder, 406 U.S. 205, 213 (1971); and have stressed that "[parents] have no constitutional right to provide their

children with private school education unfettered by reasonable government regulation," Runyon v. McCrary, 427 U.S. 160, 178 (1976).

The Academy seeks to dismiss this steady line of opinion as mere dicta "the collective weight of [which] has become a burden too great for religious litigants to overcome." Pet. at 19. It claims, moreover, that this Court's review is required because these decisions somehow conflict with what it characterizes as this Court's "modern free exercise doctrine," a doctrine which it claims the Court of Appeals ignored. Pet. at 20-21. Even the briefest examination of these claims, however, reveals them as spurious.

First, the principles contained in the line of cases the Academy seeks to dismiss are non-controversial. Indeed, the Academy itself nowhere contests the

proposition that the state has a compelling interest in the basic education of children, and the Academy expressly concedes in its Petition that the State may reasonably regulate private religious education. Pet. at 22.

Second, these principles are not in conflict with any other decisions of this Court. Rather, as discussed immediately post, the cases characterized by the Academy as this Court's "modern free exercise cases," Pet. at 20, establish a test for evaluating Free Exercise claims which recognizes both the state's compelling interest in education and the permissibility of state regulation of religious schools in service of that compelling interest. This is precisely the test employed by the Court of Appeals in evaluating the Academy's Free Exercise claim.

B. The Court of Appeals used this Court's test for the evaluation of Free Exercise claims.

The Court of Appeals, as well as the District Court, utilized the four-part test developed by this Court for evaluating Free Exercise challenges. That test seeks to determine: (1) whether the religious beliefs in question are sincerely held; (2) whether these beliefs are burdened by the proposed state action; (3) whether that proposed action serves a compelling state interest; and (4) whether that proposed action serves the compelling interest by the least restrictive means. 885 F.2d at 944, Pet. App. at 12a-13a; 666 F.Supp. at 312, Pet. App. at 111a-113a. This test is drawn directly from Wisconsin v. Yoder, 406 U.S. 205 (1972); Thomas v. Review Board, 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963); Hobbie v.

Unemployment Appeals Comm'n of Florida, 480 U.S. 136 (1987); and United States v. Lee, 455 U.S. 252 (1982), all cases from the very "modern free exercise" line which the Academy claims the Court of Appeals somehow ignored. Pet. at 19-20 & n. 8.

The Court of Appeals, applying this test, found that the Academy's religious belief that submission of its school to state approval was sincere. Second, it concluded that School Committee approval of the Academy burdened that belief. 885 F.2d at 944, Pet. App. at 14a. Third, however, it concluded, in light of the many cases discussed ante, at 12-14, that the state had a compelling interest in regulating private education. 885 F.2d at 944, Pet. App. at 16a-17a.

The Academy articulates no objection to the Court of Appeals' conclusion

regarding this third part of the Free Exercise test. Rather it is in the Court's application of the fourth, "least restrictive alternative" portion of the Free Exercise test that the Academy seeks to find fault. Under this test, the Court of Appeals compared the School Committee's proposed process, involving a review of curriculum materials and staff credentials,[7/]

7/ The Academy insists, as noted ante, at 3, that the School Committee's standards were "subjective," and cites Hague v. CIO, 307 U.S. 496, 516 (1939), for the proposition that constitutional rights should not be infringed on the basis of "mere opinion." The underlying ordinance in Hague, however, was held void upon its face because it bestowed limitless discretion on city officials. Id. In contrast, Mass. Gen. L. ch. 76, § 1, sets clear standards for the exercise of governmental discretion, and expressly forbids evaluation of religious teachings. It has, therefore, been held to be constitutional by both federal and state courts. Braintree Baptist Temple v. Holbrook Public Schools, 616 F.Supp. 81, 91 (D. Mass. 1984); Care and Protection of Charles, 399 Mass. at 330-333.

with the Academy's proposed alternative involving the voluntary annual administration of standardized tests to Church students. 885 F.2d at 943, Pet. App. at 10a. Its conclusion was unequivocal:

> [T]he record reveals too many potential educationally-related difficulties, and too little alleviation of the burden on religion, to justify the district court's conclusion that standardized testing is a "less restrictive alternative."

Id. at 448, 26a (citations omitted).

In performing its least restrictive means analysis, the Court of Appeals began with this Court's directives to ensure that the state practices in question were essential to accomplish the overriding governmental interest, United States v. Lee, 455 U.S. at 257-258, and were indeed the least restrictive means of fulfilling that interest. Thomas v. Review Board, 450 U.S. at 718. The Academy does not

object to the application of these cases, which are part of what it identifies as the Court's "modern" line of Free Exercise law. Pet. at 19-20.

As the Court of Appeals recognized, however, practical guidance is required in applying the concept of least restrictive means. In finding such additional guidance in the precedents of this Court, the Court of Appeals properly considered whether the Academy's proposed standardized testing alternative would actually satisfy the state's concededly compelling interest in education and whether that alternative would substantially avoid burdening religious beliefs. 885 F.2d at 946-947, Pet. App. at 19a-25a. As the Court of Appeals correctly points out, the approach it took was no less an application of a strict scrutiny/compelling state interest test

because it aimed "to determine in a practical way whether or not standardized testing is a constitutionally mandated less burdensome alternative" to meeting the state's compelling interest in education. 885 F.2d at 947, Pet. App. at 24a-25a; see id. at 946, 20a-21a.

C. The Court of Appeals correctly applied this Court's Free Exercise test.

The Court of Appeals exhaustively examined the central question whether the Academy's standardized testing alternative was in fact a less restrictive alternative to the School Committee's proposed approval process. In doing so it arrived at two appropriate conclusions.

First, it concluded that the testing proposal would not fulfill the state's compelling interest in assuring the basic education of its citizenry. The

Court pointed to the difficulties entailed in a testing system that was wholly voluntary:

> How can the Academy make certain the students and their parents agree to the testing plan? Suppose they do not. Suppose a parent refuses to permit the Academy to give the Committee the test results. Suppose a parent refuses to permit his child to participate in the testing, or in the remedial "follow-up." (Suppose, for example, a parent decided that doing so amounted to impermissible cooperation with secular authorities.)"

885 F.2d at 948, Pet. App. at 26a-27a. It pointed out the Establishment Clause problems inherent in a plan that would involve the School Committee in administering remedial follow-up to those students who tested poorly, id. at 948, 28a, and the limits of testing in evaluating what will occur in the classroom and whether basic skills which "do not readily reduce themselves to standardized test questions" are being taught. Id. at 948-949, 28a-30a.

Second, it concluded that the testing proposal does not "substantially alleviate[] the burden upon the free exercise of religion," id. at 950, 34a-35a, because the testing alternative "involves and implicates the Academy, at least to a degree, in the very approval process to which it objects." Id. at 949, 33a. Moreover, the testing proposal "risks imposing still greater burdens upon individual parents or children" because it leaves the School Committee with the drastic remedy of "enforc[ing] test-taking through criminal prosecutions and civil orders to remove children from their families." Id. at 950, 33a-34a.

Finally, as the Court of Appeals noted, the weight of legal precedent is strongly against the voluntary testing alternative, id. at 951, 35a-37a, which no other state has adopted. Id. at 949,

30a.[8/]

The Academy in its petition complains of the burdens imposed by the School Committee's proposed approval process, but nowhere does it address (except to the limited extent addressed in Part III, post) the Court of Appeals' conclusions about the inadequacy of its testing alternative. Its silence on this point is telling. In short, the Academy has has failed to articulate a position that satisfies the standard in U.S. Supreme Court Rule 17.1 that "[a] review on writ of certiorari...will be

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8/ Contrary to the Academy's suggestion, Pet. at 26, the Court of Appeal's rejection of the standardized testing alternative does not create a conflict in the ciruits. Murphy v. Arkansas, 852 F.2d 1039 (8th Cir. 1988), upholds a state regulatory scheme in which standardized testing was one of the mechanisms proposed by the state to monitor home education. Nothing in Murphy suggests that religious schools may require a state to limit its educational review to standardized testing.

granted only when there are special and important reasons therefor."

II. WHERE THE PROPOSED APPROVAL PROCESS WOULD NOT INVOLVE THE STATE IN THE ACADEMY'S AFFAIRS ON ANY LEVEL APPROACHING THE INEVITABLE AND SUSTAINED ENTANGLEMENT DISAPPROVED IN THIS COURT'S CASES, REVIEW OF THE ESTABLISHMENT CLAUSE CLAIM IS UNWARRANTED.

The Academy, in an attempt to persuade the Court to review this case, raises the specter of excessive entanglement of the state in its religious affairs. Pet. at 28-30. Apart from citing the uncontroversial proposition that freedom of religion is impaired by excessive government intrusion into sacred matters, Pet. at 29-30, and from asserting that the government in this case has "leaped the wall of separation [of church and state] and . . . the church [is] crying out for protection," Pet. at 30, the petitioner offers no critique of the Court of

Appeals' Establishment Clause analysis and no reason why this Court should review this case.

Indeed the only case it cites - Aguilar v. Felton, 473 U.S. 402 (1985) - fully supports the Court of Appeals' sound conclusion that the magnitude and type of state involvement condemned in the cases of this Court is nowhere approached by the facts of this case. See 885 F.2d at 952-953, Pet. App. at 42a-50a. Aguilar involved a federal aid program to religious schools which, in order to ensure an absence of religious content in the federally funded classes, imposed "a permanent and pervasive state presence in the sectarian schools receiving aid," 473 U.S. at 413, "whose primary purpose [was] to monitor teachers and students in an attempt to guard against the infiltration of religious thought." Id.

Here, by contrast, the proposed approval process would be neither permanent and pervasive nor aimed in any way at monitoring or eliminating religious content. Rather, the School Committee's proposed evaluation of the school would involve a review of written information about the school together with an on-site inspection of the school limited in time to that necessary to review secular curriculum and instructional methods and to determine whether the Academy's teachers are adequately qualified to teach the required secular subjects. 666 F.Supp. at 299-300, Pet. App. at 70a-73a. That evaluation, as the Court of Appeals pointed out, might well amount to a single on-site visit. 885 F.2d at 952, Pet. App. at 43a. If the school chose to maintain a high number of teachers without college degrees, more visits

might be required, but only those necessary to make an evaluation of their teaching skills. Id. at 952, 43a. Once this was done, inspection would cease, and once approved, the school would be subject to School Committee review chiefly through written communications once every two years. Id. at 942, 7a-8a.

The Court of Appeals, after an extensive survey of this Court's precedents, could find "no case that goes so far as to find an Establishment Clause violation in such circumstances," id. at 953-954, 48a, and the Academy has cited none. Indeed, as the Court of Appeals observed, "to say that the Establishment Clause forbids the proposal would amount to saying that the Clause forbids any classroom observation or 'check,' a holding that could significantly inhibit the state's efforts to evaluate the secular

education provided by religious schools . . . , evaluations that . . . are of critical importance to the State." Id. at 954, 49a (citations omitted). The Academy's invitation to use this case as an opportunity to achieve so radical a result should be rejected.

III. THE COURT OF APPEALS PROPERLY APPLIED THE CONSTITUTIONAL FACT DOCTRINE

The Academy, citing Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 54 (1971), concedes, as it must, that "First Amendment questions of 'constitutional fact' compel [an appellate court's] de novo review," Pet. at 32, and that "[o]f course the appellate court must be free to make a de novo review of the ultimate constitutional facts." Pet. at 32. The Academy, therefore, does not challenge this Court's constitutional fact doctrine.

Rather, its contention is merely "that the Court of Appeals misapplied this doctrine," Pet. at 32, and that it did so by "reinterpreting the predicate facts of the case." Pet. at 32. This claim, with its allusion to Fed. R. Civ. P. 52(a), Pet. at 30, appears to be that the Court of Appeals ignored the purely factual findings of the District Court upon which it predicated its legal conclusions.

The Academy does not cite a single page in the record or in the opinions below to support its claim.[9/] Rather, its argument appears to rely principally on the general assertion that the Court of Appeals "became its own expert witness on education, freely

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9/ This lack of citation to the record in an argument the evaluation of which obviously requires examination of particular findings of fact, is in itself a sufficient ground for denying the petition. See Rules of the Supreme Court of the United States, Rule 15.5

substituting its own opinions about the values of various educational practices." Pet. at 33.[10/]

10/ Apart from this assertion, the Academy alleges to two other factfinding errors of the Court of Appeals. First, it charges that the Court of Appeals "treated the academic component of the education of [the Academy] as 'secular' in nature," and thereby ignored the Academy's sincere religious belief that the secular and religious aspects of its teaching were intertwined. Pet. at 32-33. Nowhere, however, does the Court claim that academic teaching at the school is completely free of religious content. Its references to the secular education of the Academy is merely a reference to those aspects of the school's teaching which the School Committee can properly review. See ante at 11 n.6.

Second, the Academy claims that "[t]he Court of Appeals . . . treated the facts as if there were only a limited number of visits proposed to observe the school." Pet. at 31. What the Court of Appeals said, however, was that the School Committee planned to visit the Academy once, but, in the absence of teachers with adequate credentials, would be required to visit more than once. 885 F.2d at 941-942, Pet. App. at 3a, 7a. This is entirely consistent with the District Court's findings. See 666 F.Supp. at 300, Pet. App. at 72a.

This assertion, however, is simply untrue. Nowhere does the Court of Appeals disregard a purely factual finding of the District Court. It merely "come[s] to legal conclusions different from those of the district court." 885 F.2d at 941-942, Pet. App. at 11a. Indeed, this is perhaps best illustrated by the Court's discussion of the expert testimony.

To use the Academy's example, it is simply not true that "[t]he court of appeals completely disregarded the findings of fact entered by the district court as to the educational viability of standardized testing as a means of measuring academic progress." Pet. at 31. The Court of Appeals did not reject the expert testimony concerning the general usefulness of standardized testing. Rather, following the dictates of this Court's constitutional fact

doctrine, it independently examined the record to determine whether the particular standardized testing alternative proposed by the Academy adequately served the state's compelling educational interest, and whether that alternative was a less restrictive alternative than the School Committee's process.

Its legal conclusion that the Academy's proposal did not constitute a less restrictive alternative to meet the state's compelling interest was not based on the merits or demerits of standardized testing in the abstract but on the particular inadequacies of the Academy's proposal. These numerous inadequacies were, as summarized ante at 21-23, found largely in the purely voluntary nature of the testing, the difficulties inherent in a proposal that would depend on the state administering

(perhaps coercively) remedial follow-up to those students who tested poorly, and in the Free Exercise burdens posed by the alternative testing plan itself. 885 F.2d at 948-950, Pet. App. at 26a-35a.

Once again, the Academy fails to point this Court to a single deficiency in these conclusions. This is because these conclusions are sound. In sum, the Court of Appeals fully adhered to this Court's constitutional fact doctrine and properly determined that voluntary standardized testing did not constitute a less restrictive alternative means to satisfy the state's compelling interest in the education of its children.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JAMES M. SHANNON
ATTORNEY GENERAL

Robert H. Blumenthal*
Special Assistant
Attorney General
1385 Hancock Street
Quincy, MA 02169
(617) 770-7315

Maureen Brodoff
Marjorie Heins
Assistant Attorneys
General
One Ashburton Place
Boston, MA. 02108
(617) 727-2200

*Counsel of Record

4991/A